

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

TUESDAY S. BANNER,

Appellant,

V.

MERIT EMPLOYEE RELATIONS
BOARD,

Appellee.

C.A. No. N13A-04-013 DCS

Submitted: September 30, 2014

Decided: December 24, 2014

*On Appeal from the Decision of the Merit Employee Relations Board
of the State of Delaware –
Decision **AFFIRMED.***

OPINION

Tuesday S. Banner, *Pro Se* Appellant, Bear, Delaware.

W. Michael Tupman, Esquire, Deputy Attorney General, Delaware Department of Justice, Dover, Delaware, Attorney for Appellee Merit Employee Relations Board.

Laura L. Gerard, Esquire, Deputy Attorney General, Delaware Department of Justice, Wilmington, Delaware, Attorney for Appellee Delaware Department of Health and Social Services.

STREETT, J.

Introduction

Appellant Tuesday S. Banner (“Appellant”) appeals the March 12, 2013 decision issued by the Merit Employee Relations Board (the “Board”) which dismissed Appellant’s appeal of a one-day suspension without pay. The Board granted a motion to dismiss. The Board determined that it lacked jurisdiction to hear the appeal on the merits because Appellant did not timely file a direct appeal. The Board also determined that it lacked jurisdiction to hear an appeal of Appellant’s grievance because she prematurely filed the appeal before the Step 3 grievance decision was issued. The Board rejected the State of Delaware Health and Social Services’ Division for the Visually Impaired’s (“DHSS/DVI”) computation of time.

On appeal, Appellant contends that she is entitled to an evidentiary hearing on the merits of her appeal because the Board erroneously relied on a reason not raised by DHSS/DVI in its Motion to Dismiss. (DHSS/DVI asserted in the motion that Appellant’s appeal should be dismissed because Appellant untimely filed a grievance of a one-day suspension without pay.) She also contends that she timely filed her appeal with the Board under the Board’s Practice and Procedure Rules.

For the reasons set forth below, the Board’s decision that it lacked jurisdiction over the direct appeal is affirmed. The Board’s decision that it lacked

jurisdiction over the grievance is affirmed on the basis of a different rationale than that articulated by the Board.

Factual & Procedural Background

Appellant was employed as an Administrative Specialist I for DHSS/DVI.

On March 8, 2012, Genelle Fletcher (“Ms. Fletcher”), VR Senior Counselor for DHSS/DVI and Appellant’s immediate supervisor, hand-delivered a letter to Appellant.¹

In the letter, Ms. Fletcher informed Appellant that she recommended Appellant serve a one-day suspension without pay for Appellant’s “failure to follow supervisory directions and adhere to [her] Performance Plan.”²

Specifically, Ms. Fletcher alleged that Appellant left “the campus” without supervisory approval between 10:43 a.m. and 11:18 a.m. on February 20, 2012 and that Appellant’s explanation of her whereabouts (i.e., Appellant stated that she went to Wawa) was unacceptable.³ Ms. Fletcher further alleged that Appellant had not updated her calendar on at least three different occasions, had not adhered to badge swiping directives on six dates, and had been tardy ten times in the last thirty days.⁴

¹ Record at 008 – 010, 043 (hereinafter “R. at _____”).

² R. at 008.

³ *Id.*

⁴ R. at 008 – 009.

Ms. Fletcher also informed Appellant that she was entitled to a pre-suspension meeting before “a final decision in this matter.”⁵ Ms. Fletcher stated that the “meeting will provide [Appellant] with an opportunity to respond to the proposed action, and offer any reason why it may not be justified or is too severe a penalty.”⁶ Ms. Fletcher instructed Appellant to submit a written request to Ms. Fletcher within fifteen calendar days of the date of the letter if Appellant desired a pre-suspension meeting.⁷

Instead, that same day (March 8, 2012), Appellant sent an email to Ms. Fletcher which stated:

I don't have your cell #, but hopefully you get this. I just wanted to let you know that I am just going to take tomorrow [March 9, 2012] off per our conversation today. I made my phone call to reschedule and I am willing to get it out of the way. So, I am submitting to you a leave slip to reflect the time for tomorrow. Thanks.⁸

Appellant, pursuant to her preference, submitted a leave without pay request for March 9, 2012 and served the one-day suspension on that date. Appellant did not request a pre-suspension meeting.

⁵ R. at 010.

⁶ R. at 010.

⁷ *Id.*

⁸ R. at 036.

On April 26, 2012, Appellant and Ms. Fletcher reviewed Appellant's Employee Annual Leave Report.⁹ Appellant placed a checkmark on the report next to the sentence "I agree with the above balances." Appellant also handwritten the following note below her (Appellant's) signature and the date (April 20, 2012¹⁰):

Please note that on 3/9/12 it has been determined and confirmed that the above date serves as the "official date of suspension" for a disciplinary action given to me by supervisor Genelle Fletcher for 2/20/12.¹¹

Appellant's signature and the date (April 26, 2012) appear below the handwritten note.

That same day (April 26, 2012), Ms. Fletcher hand-delivered a letter (dated April 20, 2012) to Appellant.¹² In the letter, Ms. Fletcher wrote:

On March 8, 2012, you and I met and I presented you with a letter for a proposed one-day suspension without pay from your position of Administrative Specialist I. The reason for this action is your failure to follow supervisory directions and adhere to your Performance Plan. During this meeting, I advised you of your right to a pre-suspension meeting, however, you said that you wanted to think about it and later the same day sent me an email stating that you wanted to get this

⁹ R. at 038 – 039, 060.

¹⁰ The record is unclear as to whether Appellant received the Annual Leave Report prior to her April 26, 2012 meeting with Ms. Fletcher.

¹¹ R. at 039.

¹² R. at 088.

(suspension) out of the way, so you were going to take the next day (March 9, 2012) off.

I have since learned that my approach to this matter was incorrect. If you did not request a pre-suspension meeting, then a letter of imposition was to be issued and I was to designate a specific date for your suspension, so that it would be annotated in the leave system properly. In addition, there is no requirement for a leave slip for a suspension. To correct this matter, your Leave w/o pay request for March 9, 2012, will be converted to a suspension without pay and appropriately annotated in PHRST.¹³

Ms. Fletcher then summarizes the basis for Appellant's one-day suspension by repeating the same basis outlined in the March 8, 2012 letter.¹⁴

On May 10, 2012, approximately two months after serving her suspension, Appellant submitted a State of Delaware Merit Grievance form to Labor Relations. Appellant alleged that "the suspension served on March 9, 2012" was invalid because Ms. Fletcher "presented [Appellant] with suspension papers 47 days after [Appellant] served the suspension in question."¹⁵ She requested removal of the suspension from her personnel file, reimbursement of lost wages and time, and a transfer to another unit. Appellant did not cite any Merit Rules or sections of the Merit System law, although Section 2 of the grievance form prompted Appellant to provide the Merit Rule or section of the Merit System law that had been violated.

¹³ R. at 005.

¹⁴ R. at 005 – 007.

¹⁵ R. at 041.

On May 21, 2012, a Step 1 grievance hearing was held before a DHSS/DVI Hearing Officer.¹⁶

On May 30, 2012, the Step 1 Hearing Officer (the “Hearing Officer”) issued a decision denying the grievance as untimely.¹⁷ The Hearing Officer found that Appellant “surpassed” the fourteen-day period to timely file a grievance because she filed the grievance after May 5, 2012.¹⁸ The Hearing Officer noted that Appellant “stated that [she] consented to the suspension” but “has since changed [her] mind.”¹⁹ The Hearing Officer did not specify why May 5, 2012 was considered to be the deadline.

The Step 1 Hearing Officer also denied the grievance on the merits. The Step 1 Hearing Officer found that Appellant “failed to site [*sic*] the specific State of Delaware Merit Rule violation or provide documentation negating the discipline recommended by Ms. Fletcher.”²⁰

Appellant appealed the Step 1 decision and proceeded to Step 2 of the grievance process. The date that she filed the appeal and the basis for the appeal are not in the record.

¹⁶ R. at 043.

¹⁷ R. at 043 – 045.

¹⁸ R. at 044.

¹⁹ R. at 045.

²⁰ R. at 044.

On July 11, 2012, a Step 2 grievance hearing was held before the Secretary of DHSS' Designee (the "Secretary's Designee").²¹

On July 16, 2012, the Secretary's Designee issued a decision denying Appellant's grievance.²² The Secretary's Designee found that Appellant's grievance was void under Merit Rule 18.4 because Appellant untimely filed the grievance sixty-two days after she served the one-day suspension.²³ The Secretary's Designee noted that Appellant "was aware of the discipline being issued when [she] opted to serve [her] suspension on March 9."²⁴ The Secretary's Designee further noted that if "it was [Appellant's] intention to immediately take the suspension and grieve it later, as [she] stated at the hearing, then [she] should not have waited 62 days to file [her] grievance."²⁵

The Secretary's Designee also found just cause for DHSS/DVI to impose the one-day suspension upon Appellant because it was undisputed that Appellant left her workstation, went to Wawa, and later returned without telling anyone in her "chain-of-command."²⁶

²¹ R. at 125.

²² R. at 125 – 26.

²³ R. at 126.

²⁴ *Id.*

²⁵ *Id.*

²⁶ R. at 125 – 26.

Appellant appealed the Step 2 decision and proceeded to Step 3 of the grievance process. The date that she filed the appeal and the basis for the appeal are not in the record.

On July 25, 2012, prior to the Step 3 grievance hearing or decision, Appellant filed a “Merit Appeal Form for Employees Dismissed, Demoted or Suspended” with the Board.²⁷ On the Merit Appeal Form, Appellant checked the box requesting that the appeal be heard only by the Board. She indicated that she had been “suspended – hand delivered decision on April 20, 2012 (final decision).”²⁸ However, on the line adjacent to “Date of Dismissal, Demotion or Suspension,” Appellant wrote “March 9, 2012 (supervisor did not follow procedure w/ suspension date).”

On August 8, 2012, a Step 3 grievance hearing was held before Thomas J. Smith (“Mr. Smith”) of the State of Delaware Office of Management and Budget (“OMB”).²⁹

On September 21, 2012, Mr. Smith issued a Step 3 decision denying Appellant’s grievance.³⁰ Mr. Smith found that the grievance was void under Merit

²⁷ R. at 004.

²⁸ Appellant informed the Board that she “made a mistake” as to the date the letter was hand-delivered to her on the Merit Appeal Form. She stated, “It was the 26th that she [Ms. Fletcher] handed it to me.” *See* R. at 088.

²⁹ R. at 014.

³⁰ R. at 014 – 018.

Rule 18.4 because it was untimely filed.³¹ He noted that Appellant filed the grievance “63 days after receiving notice of and consenting to the suspension on March 8, 2012; 62 days after serving a day of ‘unpaid leave’ on March 9th, and; 20 days after receiving the April 20th letter which provided notice that her record was corrected to reflect a one-day suspension, rather than one day of unpaid leave.”³²

In addition, Mr. Smith found that even if the grievance was timely, the grievant “expressly waived her rights to challenge the discipline on March 8th by acknowledging her misconduct and stating that she was willing to get the suspension ‘out of the way,’ and then serving the suspension the very next day – on her own volition.”³³

Appellant did not file an appeal with the Board after she received the Step 3 decision in September 2012. However, based on the appeal forms that Appellant had filed in July, the Board Administrator scheduled an evidentiary hearing before the Board on December 10, 2012.³⁴ (The date of such evidentiary hearing is not in the record. An evidentiary hearing was not held because the Board ultimately determined it lacked jurisdiction to hear the appeal on the merits.)

³¹ R. at 017.

³² R. at 017.

³³ R. at 018.

³⁴ R. at 102 – 103.

At the hearing on DHSS/DVI’s Motion to Dismiss the appeal, the Board Administrator explained that Appellant filed two appeal forms on July 25, 2012 (i.e., an appeal of a one-day suspension and an appeal of a three-day suspension). She scheduled the evidentiary hearing “to move [the other appeal] forward.” R. at 103. The instant opinion does not address Appellant’s subsequent three-day suspension.

On February 19, 2013, DHSS/DVI filed a Motion to Dismiss the appeal of the one-day suspension.³⁵ DHSS/DVI asserted that the Board was without jurisdiction to hear the appeal because Appellant “voluntarily chose to serve” the one-day suspension on March 9, 2012 and, thus, the grievance was untimely filed on May 10, 2012 (two months later).

On February 27, 2013, Appellant filed a response opposing DHSS/DVI’s Motion to Dismiss the appeal.³⁶

On March 7, 2013, the Board held a hearing on the Motion to Dismiss.

First, the Board heard the parties’ arguments concerning the grievance.

DHSS/DVI’s attorney argued that Appellant’s grievance was untimely filed because Appellant served the one-day suspension on March 9, 2012 and did not request a pre-suspension hearing or otherwise dispute the discipline until she filed the grievance on May 10, 2012.³⁷

Appellant argued that she timely filed her grievance fourteen days after she met with Ms. Fletcher on April 26, 2012, which was the date Ms. Fletcher presented her with “the paperwork” of the “correct filing of the suspension or the correct procedures.”³⁸

³⁵ R. at 019 – 023.

³⁶ R. at 051.

³⁷ R. at 056, 061.

³⁸ R. at 064, 067.

Appellant stated that Ms. Fletcher told her on February 29, 2012 that “a suspension [would be] coming down the pike” and “then she [Ms. Fletcher] came back March the 8th . . . with a suspension.”³⁹ When asked by the Board’s attorney why Appellant served her suspension on March 9, 2012, Appellant responded:

She [Ms. Fletcher] asked me what day did I want to serve the suspension on . . . I said, tomorrow. I said, because I know you guys are not going – if I go through a whole thing about the pre-suspension hearing, you guys are not – it’s not going to go in my favor. So what should I – is that okay? And she said that it was okay to do. So I took that day.⁴⁰

Appellant acknowledged that she had read Ms. Fletcher’s March 8, 2012 letter, she knew that she had an opportunity to request a pre-suspension meeting, and she decided not to request a pre-suspension meeting.⁴¹

The Board next addressed a direct appeal.

The Board Administrator stated that Appellant simultaneously filed two appeal forms with the Board on July 25, 2012.⁴² The forms concerned a one-day suspension and a subsequent three-day suspension. The Board Administrator maintained that she advised Appellant that the appeal of the one-day suspension “had to go through [Step 3] before it could come [to the Board] because it was

³⁹ R. at 065.

⁴⁰ R. at 064 – 065.

⁴¹ R. at 066.

⁴² R. at 071, 077.

already in process.”⁴³ Appellant acknowledged that she was told that she had “submitted [her appeal] prematurely.”⁴⁴

The Board Administrator further stated that Appellant did not file a second appeal after the Step 3 decision was issued.⁴⁵ Appellant confirmed that she did not file a second appeal after Step 3 when she told the Board that she “thought it was resolved, so [she] let it go.”⁴⁶

On March 12, 2013, the Board issued a decision, granting DHSS/DVI’s Motion to Dismiss for lack of jurisdiction.⁴⁷

The Board determined that the fourteen-day period within which to timely file a grievance began on April 27, 2012, the day after Appellant’s suspension was finalized, and that Appellant timely filed the grievance on the fourteenth day (May 10, 2012). The Board reasoned that “[e]ven when an employee does not avail

⁴³ R. at 072.

During the hearing, the Board Administrator also stated that she sent Appellant an email on August 24, 2012 and read the email into the record. In the email, the Board Administrator references a July 27, 2012 email to Appellant informing her that she “needed to complete [the grievance] process [under Merit Rule 18] before the appeal could be scheduled before [the Board].” The Board Administrator instructed Appellant to advise the Board whether she wished to continue the appeal after she received the Step 3 decision. She also advised Appellant that the three-day suspension was imposed as part of a progressive disciplinary process and that the Board could not address that appeal until “the one-day suspension is resolved.” The Board Administrator further stated that she received an email response from Appellant, thanking her because Appellant wanted to ensure she was “following and waiting for the right decisions before proceeding.” R. at 098 – 099.

⁴⁴ R. at 072 – 073.

⁴⁵ R. at 071.

⁴⁶ R. at 102.

⁴⁷ R. at 127 – 135.

herself of her right to a pre-deprivation meeting under Merit Rule 12.4, she still has the right to file a timely Step 1 grievance under Merit Rule 18.6.”⁴⁸

Nevertheless, the Board concluded that it lacked jurisdiction over the appeal.⁴⁹ The Board found that “[t]o the extent [Appellant] was trying to file a direct appeal to the Board under Merit Rule 12.9 . . . the appeal was untimely” because Appellant was required to file a direct appeal thirty days after she met with Ms. Fletcher on April 26, 2012.⁵⁰ The Board also found that Appellant prematurely filed an appeal on July 25, 2012 and did not timely re-file an appeal as required by Merit Rule 18.9.⁵¹ The Board noted that the Board Administrator’s letter put Appellant on notice that the appeal was premature and that she could re-file the appeal after she received the Step 3 decision.⁵²

Appellant timely appealed the Board’s decision on April 4, 2013.⁵³

⁴⁸ R. at 131.

⁴⁹ R. at 133.

⁵⁰ R. at 131.

⁵¹ R. at 132.

⁵² The Board Administrator’s letter was not included in the record submitted to the Court.

⁵³ When Appellant filed the Notice of Appeal in the Superior Court, she only named the Board as a party. In addition, the docket showed that the Notice of Appeal was filed six days after the 30-day statutory period for filing an appeal in Superior Court. The Court resolved both issues in separate decisions.

First, the Court determined that DHSS/DVI is the proper party in interest. *See Banner v. Merit Emp. Relations Bd.*, C.A. No. N13A-04-013 DCS (Del. Super. May 23, 2014) (OPINION).

Then, the Court found that Appellant had timely filed a Notice of Appeal with the Prothonotary and maintained jurisdiction. *See Banner v. Merit Emp. Relations Bd.*, C.A. No. N13A-04-013 DCS (Del. Super. Aug. 15, 2014) (ORDER).

Parties' Contentions

Appellant contends that the Board erred and violated her right to due process by dismissing the appeal on a basis that DHSS/DVI did not assert in its Motion to Dismiss, thereby precluding her from an evidentiary hearing on the merits of the appeal. (DHSS/DVI asserted that Appellant's appeal should be dismissed because Appellant untimely filed a grievance of a one-day suspension without pay.) Appellant argues that the Board "institute[d] a new rule" to eliminate filing an appeal after any step of the grievance process in violation of her due process rights and that she timely filed her appeal to the Board under the Board's Practice and Procedure Rule 10(A).⁵⁴

DHSS/DVI maintains that the Board's decision is legally correct and is supported by substantial evidence. DHSS/DVI asserts that Appellant was required to proceed through the three-step process under Merit Rules 18.6 – 18.9 because she initiated a grievance rather than a direct appeal to the Board under Merit Rule 12.9, which required her to file an appeal within thirty days of the suspension. DHSS/DVI further asserts that Appellant's reliance on the Board's Practice and Procedure Rule 10(A) is misplaced because Rule 10(A) does not specify the time for filing an appeal.

⁵⁴ Amended Opening Br., 12 (Oct. 3, 2013).

Standard of Review

On appeal from a Merit Employee Relations Board decision, the Court determines whether the Board “acted within its statutory authority, whether it properly interpreted and applied the applicable law, whether it conducted a fair hearing and whether its decision is based on sufficient substantial evidence and is not arbitrary.”⁵⁵ Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”⁵⁶ Questions of law and statutory interpretation are reviewed *de novo*.⁵⁷

In reviewing the Board’s decision, the Court does not “reweigh the evidence, determine issues of credibility, or draw [its] own factual conclusions.”⁵⁸ Moreover, the Court defers to “an administrative agency’s construction of its own rules in recognition of its expertise in a given field” unless such construction is “clearly wrong.”⁵⁹

⁵⁵ *Avallone v. Del. Dep’t of Health & Soc. Servs.*, 14 A.3d 566, 570 (Del. 2011) (internal quotation marks omitted) (quoting *Hopson v. McGinnes*, 391 A.2d 187, 189 (Del. 1978)). See also *Burton v. State*, 2014 WL 1171785, *2 (Del. Mar. 21, 2014).

⁵⁶ *Christman v. Del. Dep’t of Health & Soc. Servs.*, 2014 WL 3724215, *2 (Del. July 25, 2014) (internal quotation marks omitted) (quoting *Stanford v. State Merit Emp. Relations Bd.*, 2012 WL 1549811, *3 (Del. May 1, 2012)).

⁵⁷ *Sweeney v. Del. Dep’t of Transp.*, 55 A.3d 337, 342 (Del. 2012).

⁵⁸ *Norcisa v. Dep’t of Health & Soc. Servs.*, 2014 WL 1258304, *3 (Del. Mar. 25, 2014).

⁵⁹ *Christman v. Del. Dep’t of Health & Soc. Servs.*, 2014 WL 3724215 at *2 (internal quotation marks omitted) (quoting *Stanford v. State Merit Emp. Relations Bd.*, 2012 WL 1549811 at *3).

Discussion

Title 29, Chapter 59 of the Delaware Code (titled the “Merit System of Personnel Administration”) establishes “a system of personnel administration based on merit principles and scientific methods governing the employees of the State in the classified service.”⁶⁰ The Merit System of Personnel Administration, or Merit System law, applies to “all positions of state employment” unless the position is excluded from the classified service.⁶¹

Pursuant to 29 *Del. C.* § 5914, the Board is authorized to adopt rules “covering the classified service” (i.e., the State of Delaware Merit Rules).⁶² The Merit Rules “apply to initial probationary, Merit and limited term employees.”⁶³

Here, it is undisputed that Appellant, an Administrative Specialist I for DHSS/DVI, was an employee in the classified service when she received the one-day suspension without pay. As such, the Merit System law and Merit Rules apply to Appellant.

⁶⁰ 29 *Del. C.* § 5902. See also *Del. Dep’t of Natural Res. & Envtl. Control v. Murphy*, 2001 WL 282817, *3 (Del. Super. Mar. 19, 2001).

⁶¹ See 29 *Del. C.* § 5903 (listing the state employment positions that are excluded from the classified service).

⁶² 29 *Del. C.* § 5914.

⁶³ Merit Rule 1.1; 19 *Del. Admin. C.* § 3001-1.1.

The Board and the parties reference the State of Delaware Merit Rules that were adopted by the Board on January 1, 2004 and last updated on July 31, 2009. These Merit Rules differ in their internal numbering from the Delaware Administrative Code and are available on the Board’s Web site. For ease of reference, the Court will refer to the Merit Rule numbers referenced by the Board and the parties in the body of the Court’s opinion. The Court will include dual citations in the correlative footnotes.

The Merit System law and the Merit Rules afford an employee in the classified service two mechanisms for appealing a suspension to the Board: a direct appeal and an appeal of a grievance. Because it was unclear whether Appellant intended to file a direct appeal or an appeal of her grievance, the Board addressed both in its decision to dismiss the appeal.

I. The Board lacked jurisdiction over Appellant's untimely filed direct appeal.

Merit Rule 12.1 provides that state employees “shall be held accountable for their conduct” and, as a result, disciplinary measures may be imposed upon them for just cause.⁶⁴ However, before “finalizing a dismissal, suspension, fine or demotion action,” Merit Rule 12.3 mandates that a state employee “shall be notified in writing” of the proposed disciplinary action and the reasons for such action.⁶⁵

In addition, pursuant to Merit Rule 12.4, the employee “shall receive written notice of [his or her] entitlement to a pre-decision meeting.” The purpose of a pre-decision meeting is to “provide employees an opportunity to respond to the proposed action, and offer any reasons why the proposed penalty may not be justified or is too severe.”⁶⁶ An employee who “desire[s]” a pre-decision meeting

⁶⁴ Merit Rule 12.1; 19 *Del. Admin. C.* § 3001-13.1.

⁶⁵ Merit Rule 12.3; 19 *Del. Admin. C.* § 3001-13.3.

⁶⁶ Merit Rule 12.4; 19 *Del. Admin. C.* § 3001-13.4.

“shall submit a written request for a meeting to their Agency’s designated personnel representative within 15 calendar days from the date of notice.”⁶⁷

Pursuant to 29 *Del. C.* § 5949(a), a state employee may appeal to the Board for review of his or her dismissal, demotion, or suspension “[w]ithin 30 days after any such dismissal, demotion or suspension.”⁶⁸ Additionally, Merit Rule 12.9 provides that once a state employee has been dismissed, demoted, or suspended, the employee may challenge the disciplinary action by filing “an appeal directly with the Director [of the Office of Management and Budget (“OMB”)] or the [Board] within 30 days of such action.”⁶⁹ In the alternative, the employee “may simultaneously file directly with the Director, who must hear the appeal within 30 days” and then the appeal “shall continue at the [Board]” if “the employee is not satisfied with the outcome at the Director’s level.”⁷⁰

In the instant case, Appellant knew that a suspension was “coming down the pike” and met with her immediate supervisor (Ms. Fletcher) on March 8, 2012 to discuss a proposed one-day suspension without pay. Appellant acknowledged that she received written notification (Ms. Fletcher’s March 8, 2012 letter) and that she

⁶⁷ *Id.*

⁶⁸ The procedure for appeal of a grievance is discussed in Part II of this opinion.

⁶⁹ Merit Rule 12.9; 19 *Del. Admin. C.* § 3001-13.9. *See also* 29 *Del. C.* § 5901(a)(5) (“‘Director’ means the Director of the Office of Management and Budget appointed pursuant to [Chapter 59]”); Merit Rule 19.0; 19 *Del. Admin. C.* § 3001-2.0 (“‘**Director**’: the Director of the Office of Management and Budget, appointed pursuant to 29 *Del. C.* Chapter 59, or designee”) (emphasis in original).

⁷⁰ Merit Rule 12.9; 19 *Del. Admin. C.* § 3001-13.9.

(Appellant) read the letter which notified her of the proposed one-day suspension without pay, the reasons for the proposed disciplinary action, and her right to request a pre-suspension meeting before a final decision in the matter. The letter also informed Appellant that the purpose of the pre-suspension meeting is to provide Appellant with an opportunity to respond to the proposed one-day suspension and offer any reason why it may not be justified or may be too severe.

Appellant twice acknowledged to the Board that she served the one-day suspension on March 9, 2012 (on the appeal form that she submitted and during the hearing on the motion to dismiss). In addition, Appellant's handwritten note on her Employee Annual Leave Report (dated April 26, 2012) acknowledges March 9, 2012 as the "official date of [her] suspension."⁷¹ On the same date as Appellant's annual leave report (April 26, 2012), Ms. Fletcher's letter notified Appellant that her March 9, 2012 leave without pay request would be properly annotated in the leave system as a suspension without pay. The April 26, 2012 letter confirmed the date that Appellant chose to be suspended and it did not change the date that Appellant was suspended (March 9, 2012) or the reasons for her one-day suspension.

It is undisputed that Appellant never requested a pre-suspension meeting. Instead, on the same day that Appellant received written notification of the

⁷¹ R. at 039.

proposed suspension (March 8, 2012), she informed her supervisor that she was willing to get the suspension “out of the way” and would submit a leave without pay request for the following day (March 9, 2012).

Under Merit Rule 12.9, if Appellant opted to file a direct appeal with the Board, she was required to file such appeal within 30 days of her suspension (March 9, 2012). Time is a jurisdictional requirement.⁷² The Delaware Supreme Court has held that a challenge to “jurisdiction may be raised at any time in the proceedings.”⁷³ Because the Board’s power and authority derives exclusively from statute, the Board’s power “extends only to those cases which are properly before it in compliance with the statutory law.”⁷⁴ Hence, the Board does not have jurisdiction to consider an untimely appeal (i.e., “an appeal not taken within 30 days after any dismissal, demotion or suspension”).⁷⁵

Here, the record shows that Appellant filed an appeal form with the Board on July 25, 2012, more than four months after her acknowledged suspension on March 9, 2012. Appellant’s filing was untimely. Thus, the Board did not err in

⁷² *Maxwell v. Vetter*, 311 A.2d 864, 865 (Del. 1973) (“Perfection of the review proceeding within the time limited by statute is jurisdictional”).

⁷³ *Id.* at 866.

⁷⁴ *Id.* at 865. See also *Parker v. Dep’t of Corrs.*, 2000 WL 973318, *2 (Del. Super. May 25, 2000) (holding the Board’s “power is derived exclusively from statute and extends only to those cases that are properly before it”).

⁷⁵ *Id.* at 865.

determining that it lacked jurisdiction to hear a direct appeal under Merit Rule 12.9.⁷⁶

II. The Board lacked jurisdiction over Appellant's appeal of her grievance because the grievance was untimely filed and, therefore, void under Section 18.0 of the Merit Rules.

Pursuant to 29 *Del. C.* § 5943(a):

[t]he exclusive remedy available to a classified employee for the redress of an alleged wrong, arising under a misapplication of any provision of [Merit System of Personnel Administration, 29 *Del. C.* ch. 59], the merit rules or the Director's regulations adopted thereunder, is to file a grievance in accordance with the procedure stated in the merit rules.

The procedure for filing a grievance for misapplication of the Merit System law or the Merit Rules is outlined in Section 18.0 of the Merit Rules.⁷⁷ Merit Rule 18.6 provides that a grievant “shall file, within 14 calendar days of the date of the grievance matter or the date they could reasonably be expected to have knowledge of the grievance matter, a written grievance which details the complaint and relief sought with their immediate supervisor.”⁷⁸ Furthermore, if the grievance is about

⁷⁶ The Board determined that Appellant untimely filed a direct appeal on July 25, 2012 because she was required to file a direct appeal “within thirty days after April 26, 2012.” R. at 131. Even if Appellant was required to file a direct appeal with the Board within 30 days of April 26, 2012, she did not file an appeal until two months later on July 25, 2012. However, substantial evidence in the record does not support that April 26, 2012 is the date of Appellant's suspension.

⁷⁷ Merit Rule 18.0 *et seq.*; 19 *Del. Admin. C.* § 3001-19.0 *et seq.*.

⁷⁸ Merit Rule 18.6; 19 *Del. Admin. C.* § 3001-19.6.

demotion for just cause, suspension, or dismissal, the grievance “shall be filed in writing to the top agency personnel official or representative.”⁷⁹

The fourteen-day period for filing a grievance begins to run on the “date of the grievance matter”⁸⁰ or the date that the employee “reasonably should have known of the ‘event’ or ‘personnel action’” that gives rise to the employee’s grievance.⁸¹ The employee’s failure “to comply with time limits shall void the grievance” under Merit Rule 18.4.⁸² Accordingly, if the employee untimely files a grievance, the Board does not have jurisdiction to hear the grievance on the merits.⁸³

In the instant case, Appellant filed a grievance of the one-day suspension on May 10, 2012. The record shows that Appellant opted to serve her suspension immediately after notification and served her suspension on March 9, 2012. The record is undisputed that Appellant sent an email to her supervisor one day after DHSS/DVI informed her of her one-day suspension and offered to serve her

⁷⁹ Merit Rule 18.4; 19 Del. Admin. C. § 3001-19.4.

⁸⁰ Merit Rule 18.6; 19 Del. Admin. C. § 3001-19.6.

⁸¹ *Fam. Ct. of Del. v. Tucker*, 2014 WL 4794407, *4 (Del. Super. Sept. 25, 2014) (quoting W. Michael Tupman, *Merit Employee Relations Board Practice and Procedure Manual*, at 81 (2013) http://merb.delaware.gov/pdfs/MERB_Practice_&_Procedure_Manual_2013.pdf).

⁸² Merit Rule 18.4; 19 Del. Admin. C. § 3001-19.4.

⁸³ *Fam. Ct. of Del. v. Tucker*, 2014 WL 4794407 at *4. See also *Cunningham v. State Dep’t of Health & Soc. Servs.*, 1996 WL 190757, *2 (Del. Super. Mar. 27, 1996) (finding “the Board had no jurisdiction to hear [the appellant’s] grievance because he filed the discrimination grievance fifty days after the ten-day deadline imposed by the Merit Rules), *aff’d*, 1996 WL 3135039 (Del. June 3, 1996); *Rodgers v. Dep’t of Corr.*, Docket No. 11-09-525 (Del. Merit Emp. Relations Bd. Dec. 20, 2011) (dismissing appeal for lack of jurisdiction where the appellant untimely filed grievance nineteen days after receiving notice of a three-day suspension).

suspension on March 9, 2012. Furthermore, Appellant admitted that March 9, 2012 was her suspension date (when she appeared before the Board), and she acknowledged March 9, 2012 as her suspension date on her annual leave report. Thus, the date of the grievance matter is the date of her suspension (March 9, 2012) and Appellant was required to file a grievance within fourteen calendar days of March 9, 2012. Nevertheless, Appellant filed the grievance on May 10, 2012, which was more than two months after the date of the grievance matter. Consequently, her grievance is untimely, void under Merit Rule 18.4, and the Board does not have jurisdiction to hear Appellant's grievance on the merits.

In view of the fact that the grievance was void, the Board was not required to address whether Appellant prematurely filed her appeal.

Section 18.0 of the Merit Rules outlines a three-step grievance process that occurs after the employee and her supervisor "informally meet and discuss employee claims of Merit Rule or Merit law violations prior to filing a formal grievance."⁸⁴ Under Merit Rule 18.9, the employee "may present, within 20 calendar days of receipt of the Step 3 decision or the date of the informal meeting, whichever is later, a written appeal to the [Board] for final disposition according to 29 [Del. C.] § 5931 and [Board] procedures" if Step 3 of the grievance process

⁸⁴ Merit Rule 18.1; 19 Del. Admin. C. § 3001-19.1.

does not resolve the grievance.⁸⁵ It is also undisputed that Appellant never presented a written appeal of the Step 3 decision.

Contrary to Appellant's contention that the Board created a new rule to eliminate filing an appeal after any step of the grievance process in violation of her due process rights, the law is clear that the "three-step grievance process . . . must be adhered to before seeking review [of the grievance] by the Board."⁸⁶ Practice and Procedure Rule 10(A) outlines the procedure for filing an appeal.⁸⁷ Merit Rule 18.9 specifies the period for filing an appeal.

Here, Appellant filed the appeal with the Board after she appealed the Step 2 decision and prior to the Step 3 hearing and decision. Although Appellant contends that she timely filed an appeal under the Board's Practice and Procedure

⁸⁵ Merit Rule 18.9; 19 *Del. Admin. C.* § 3001-19.9. *See also* 29 *Del. C.* 5931(c)(3) ("If the complainant employee is not satisfied with the Director or designee's decision, the employee may submit a written appeal to the [Board] within 20 calendar days of receipt of that decision. Such appeal shall be handled and processed in the same manner as other appeals heard by the MERB").

⁸⁶ *Chapman v. Del. Dep't of Health & Soc. Servs.*, 2009 WL 2386090, *4 (Del. Super. July 31, 2009).

⁸⁷ *See* RULES GOVERNING PRACTICE AND PROCEDURE BEFORE THE MERIT EMPLOYEE RELATIONS BOARD, r. 10, available at <http://merb.delaware.gov/operations.shtml>:

(A) All appeals filed with the Board, whether direct appeals or appeals after one (1) or more of the Steps in the grievance process under the Merit Rules, shall be in writing, shall be signed by the appellant or his or her attorney, and shall include at least the following:

- (1) A specific identification of the act or omission complained of and the date or dates of occurrence or non-occurrence;
- (2) The specific identification of the Merit Rule or Rules alleged to have been violated;
- (3) A summary of the argument and legal authorities to be presented;
- (4) Full name, mailing address, and telephone number of the appellant and his or her attorney or lawful representative, if any;
- (5) The full identification of the appointing authority or other entity whose action or inaction is the subject of the appeal;
- (6) If applicable, a copy of the written decision(s) from the last step of the grievance process.

Rule 10(A), the Board did not err in finding that it lacked jurisdiction over the grievance because Appellant had not adhered to the three-step grievance process.

Ultimately, the Board's determination that it lacked jurisdiction to hear the grievance on the merits is legally correct. Although the Board did not properly interpret and apply Merit Rule 18.4 when it found that Appellant timely filed the grievance, the Court affirms the Board's ultimate decision to dismiss the appeal of the grievance for lack of jurisdiction.⁸⁸

Conclusion

The Board did not err in determining that it lacked jurisdiction to hear a direct appeal under Merit Rule 12.9.⁸⁹ Appellant filed an appeal form with the Board more than four months after her suspension on March 9, 2012 which was well beyond the thirty-day period provided to file a direct appeal. The Board does not have jurisdiction to consider an untimely appeal.

Furthermore, Appellant exceeded the fourteen-day period for filing a grievance, the grievance is void under Merit Rule 18.4, and the Board lacked jurisdiction to hear the grievance on the merits, irrespective of whether the Board erred in finding that Appellant timely filed the grievance. Appellant filed the

⁸⁸ See *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1390 (Del. 1995) (recognizing the "Court may affirm on the basis of a different rationale than that which was articulated by the trial court").

⁸⁹ Appellant's appeal of her subsequent three-day suspension is not covered in this opinion. The Board issued a separate decision on August 22, 2013, denying Appellant's grievance of her three-day suspension on the merits. Appellant filed an appeal of the Board's August 22, 2013 decision with the Court on September 20, 2013. That appeal was dismissed based on Appellant's failure to pay the filing fee. See *Banner v. Merit Emp. Relations Bd.*, C.A. No. N13A-09-012 DCS (Del. Super. Jan. 28, 2014) (ORDER).

grievance more than two months after the date of the grievance matter (i.e., the date of her suspension on March 9, 2012).

Accordingly, the Board's decision that it lacked jurisdiction to hear the direct appeal and the grievance is hereby AFFIRMED.

IT IS SO ORDERED.



Diane Clarke Streett
Judge

Original to Prothonotary

cc: Tuesday S. Banner, *Pro Se* Appellant (via First Class mail only)
W. Michael Tupman, Esquire, Deputy Attorney General
Laura Gerard, Esquire, Deputy Attorney General